

IN THE MATTER OF
JON McINTYRE and
DEBORAH SMITH

Appellant

vs.

THE ANIMAL MATTERS HEARING
BOARD

Appellee

* BEFORE THE
* HOWARD COUNTY
* BOARD OF APPEALS
* Case No. BA 656-D

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DECISION AND ORDER

The Howard County Board of Appeals (the "Board") convened on February 26, 2009, to hear the Appellants, Jon McIntyre and Deborah Smith, and the Appellee, the Animal Matters Hearing Board ("AMHB"), argue the merits of the Appellant's appeal of the AMHB decision and order dated November 19, 2008, which affirmed Civil Citation and Cease and Desist Order No. 8289 in AMHB Case No. 08-068.

The Appellant was not represented by counsel at the hearing. The Appellee was represented by counsel, Melissa S. Whipkey, Assistant County Solicitor. Camela J. Sandmann, Assistant County Solicitor, was the legal advisor for the Board.

Members of the Board present at the hearing were Albert Hayes, Kevin Doyle, Henry Eagles, James Walsh and Maurice Simpkins. Chairperson James Walsh presided.

This case is an appeal on the record and the hearing was conducted in accordance with Section 2.210(b) of the Board's Rules of Procedure. In an appeal on the record, the appellant has the burden of establishing that the action by the administrative agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law.

The Board of Appeals standard of review in appeals based on the record is the same standard of review employed by the Court of Special Appeals and circuit courts in reviewing administrative decisions. See, Mortimer v. Howard Research and Development Corporation, et al., 83 Md. App. 432, 443 (1990), cert. denied 321 Md. 164 (1990). In making a determination of whether the AMHB's decision is arbitrary, illegal or capricious, this Board must decide whether the question before the AMHB was "fairly debatable." Howard County v. Dorsey, 45 Md. App. 692, 700 (1980), rev'd on other grounds, 292 Md. 351, 438 A.2d 1339 (1982). An issue is fairly debatable if reasonable persons could have reached a different conclusion on the evidence and, if so, a reviewing court may not substitute its judgment for that of the administrative agency. Eger v. Stone, 253 Md. 533, 542, 253 A.2d 372 (1969). A decision is fairly debatable if it is supported by substantial evidence on the record taken as a whole. Dorsey, 45 Md. App. At 701, 416 A.2d 23, quoting Sedney v. Lloyd, 44 Md. App. 633, 637, 410 A.2d 616 (1980).

Thus, this Board's role in the instant case is to decide whether the AMHB's decision was arbitrary, illegal or capricious. This review is limited to a determination based on the record - in this case, the record from the AMHB.

The Howard County Code, the Howard County Charter, the petition of the Appellant, the Memorandum of the Appellant, and the Memorandum of the Appellee were incorporated into the record by reference.

The Board heard oral arguments from both Appellant and Appellee.

THE AMHB DECISION

In light of the standard of review, the Board will examine the relevant factual findings of the AMHB to determine if each was supported by substantial evidence.

On October 21, 2008, the Animal Matters Hearing Board heard AMHB Case No. 08-068.

This case involved the appeal of Jon McIntyre and Deborah Smith from Civil Citation and Cease and Desist Order Nos. 8289 issued upon the affidavit of Kenny Livesay. Ticket No. 8289 charged the Appellant with a violation of Howard County Code, Section 17.302(a) 9, which prohibits a domesticated animal from disturbing the public peace.

Kenny Livesay testified in support of his affidavit and stated that he has a problem with the repeated crowing of a rooster owned by his next door neighbor, Jon McIntyre. Mr. Livesay stated that the rooster crows non-stop in the early morning hours. Mr. Livesay stated that the crowing makes it difficult for him to rest after he works nights for the volunteer fire department. Mr. Livesay's Animal Control affidavit recites specific dates and times of the rooster crowing.

Jon McIntyre testified in opposition to the affidavit and stated that the noise level generated by his small rooster is only 45 decibels. Mr. McIntyre stated that his home is located on five acres and that his home location is a significant distance from the Livesay residence and that the rooster lived under his window.

The AMHB found that, on August 3, 2008, and various other dates, a rooster, which is a domesticated animal located on the property of Jon McIntyre and Deborah Smith, did crow for a length of time so as to cause a disturbance to Kenny Livesay. The AMHB affirmed civil citation No. 8289 and imposed a \$100.00 monetary penalty.

Mr. Livesay's testimony alone is sufficient evidence upon which the AMHB could reasonably have concluded that Mr. McIntyre and Ms. Smith violated Section 17.302(a)(9) of the Howard County Code. The record reveals substantial evidence in the record, namely the affidavit and supporting testimony from Mr. Livesay, as well as the fact that Mr. McIntyre never denied that his rooster crowed, which makes the decision "fairly debatable", and one in which this Board will not substitute its judgment for that of the AMHB.

Based upon a review of the record and after consideration of the written and oral arguments of the parties, this Board finds competent material and substantial evidence does exist to amply support each of the findings of fact made by the AMHB.

CONCLUSIONS OF LAW

The decision of the AMHB is supported by substantial evidence in the record as a whole and is not arbitrary or capricious, contrary to law, or clearly erroneous.

ORDER

Based upon the foregoing, it is this 12th day of MARCH, 2009, by the Howard County Board of Appeals, **ORDERED**:

That the Petition of Appeal of Jon McIntyre and Deborah Smith of the AMHB's Decision and Order for Case Numbers 08-068 is **AFFIRMED**;

BUT the fine is **MODIFIED** from one hundred dollars (\$100.00) to no fine (\$0).

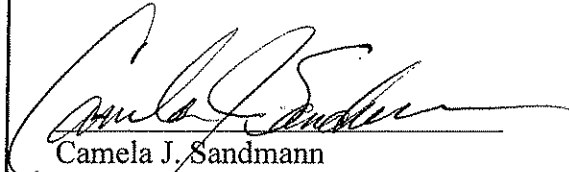
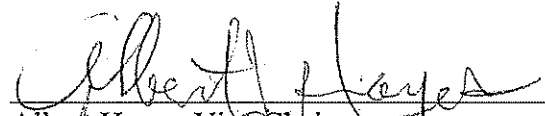
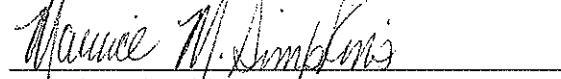
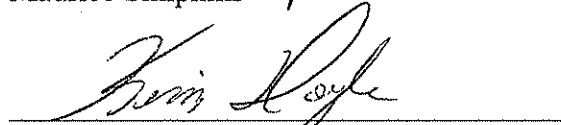
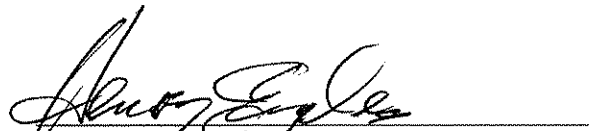
ATTEST:

HOWARD COUNTY BOARD OF APPEALS

Ann Nicholson
Ann Nicholson, Secretary

Dissent
James Walsh, Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR


Camela J. Sandmann
Assistant County Solicitor
Albert Hayes, Vice Chairperson
Maurice Simpkins
Kevin Doyle
Henry Eagles